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6 **UNITED STATES DISTRICT COURT**  
7 **WESTERN DISTRICT OF WASHINGTON**  
8 **AT SEATTLE**

9 PETER J.L. PICOLET,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of  
Social Security,

13 Defendant.

NO. C11-5429-MJP-JPD

REPORT AND  
RECOMMENDATION

14 Plaintiff Peter J.L. Picolet appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) which denied his application for Supplemental  
16 Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f,  
17 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,  
18 the Court recommends that the Commissioner’s decision be AFFIRMED.

19 **I. FACTS AND PROCEDURAL HISTORY**

20 At the time of the administrative hearing, plaintiff was a 31-year-old man with a ninth  
21 grade education that included some special education classes. Administrative Record (“AR”)  
22 at 26, 27, 29, 212, 293. Plaintiff has never been gainfully employed. AR at 12, 25, 29, 126,  
23 134.

1 On August 27, 2007, plaintiff filed a claim for SSI payments. AR at 10, 112. Plaintiff  
2 asserts that he is disabled due to Attention Deficit Disorder (“ADD”) and depression. AR at  
3 128.

4 The Commissioner denied plaintiff’s claim initially and on reconsideration. AR at 10,  
5 56-59, 64-70. Plaintiff requested a hearing which took place on November 6, 2009. AR at 10.  
6 On December 14, 2009, the ALJ issued a decision finding plaintiff not disabled and denied  
7 benefits based on his finding that plaintiff could perform a specific job “existing in significant  
8 numbers in the national economy.” AR at 16-17. On April 7, 2011, the Appeals Council  
9 denied plaintiff’s request for review, making the ALJ’s decision the final decision of the  
10 Commissioner of Social Security in this case. AR at 1-4. On June 6, 2011, plaintiff timely  
11 filed the present action challenging the Commissioner’s decision. Dkt. 1.

## 12 II. JURISDICTION

13 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§  
14 405(g) and 1383(c)(3).

## 15 III. STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of  
17 social security benefits when the ALJ’s findings are based on legal error or not supported by  
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
19 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is  
20 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
21 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
22 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
23 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
24 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a

1 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
2 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
3 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
4 must be upheld. *Id.*

5 The Court may direct an award of benefits where "the record has been fully developed  
6 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
7 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
8 (9th Cir. 1996)). The Court may find that this occurs when:

9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
10 claimant's evidence; (2) there are no outstanding issues that must be resolved  
11 before a determination of disability can be made; and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

12 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
13 erroneously rejected evidence may be credited when all three elements are met).

#### 14 IV. EVALUATING DISABILITY

15 As the claimant, Mr. Picolet bears the burden of proving that he is disabled within the  
16 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
17 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
18 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
19 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
20 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are  
21 of such severity that he is unable to do his previous work, and cannot, considering his age,  
22 education, and work experience, engage in any other substantial gainful activity existing in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
24 99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for  
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
7 §§ 404.1520(b), 416.920(b).<sup>1</sup> If he is, disability benefits are denied. If he is not, the  
8 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
9 or more medically severe impairments, or combination of impairments, that limit his physical  
10 or mental ability to do basic work activities. If the claimant does not have such impairments,  
11 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
12 impairment, the Commissioner moves to step three to determine whether the impairment meets  
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed  
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
20 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
21 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,

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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 then the burden shifts to the Commissioner at step five to show that the claimant can perform  
2 other work that exists in significant numbers in the national economy, taking into consideration  
3 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),  
4 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable  
5 to perform other work, then the claimant is found disabled and benefits may be awarded.

## 6 V. DECISION BELOW

7 On December 14, 2009, the ALJ issued a decision finding the following:

- 8 1. The claimant has not engaged in substantial gainful activity since  
9 August 27, 2007, the application date.
- 10 2. The claimant has the following severe impairments: cognitive  
11 disorder, not otherwise specified, antisocial personality disorder, and  
12 anxiety disorder, not otherwise specified.
- 13 3. The claimant does not have an impairment or combination of  
14 impairments that meets or medically equals one of the listed  
15 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 16 4. After careful consideration of the entire record, the undersigned finds  
17 that the claimant has the residual functional capacity (RFC) to perform  
18 a full range of work at all exertional levels but with the following  
19 nonexertional limitations: the claimant is able to remember simple  
20 instructions and is able to sustain concentration on simple, repetitive  
21 tasks. He would work at an episodically slow work pace, but he  
22 would be productive at simple, routine work. The claimant would be  
23 able to accept instructions and cooperate with a few co-workers away  
24 from the general public
5. The claimant has no past relevant work.
6. The claimant was born on XXXX, 1978 and was 29 years old, which  
is defined as a younger individual age 18-44, on the date the  
application was filed.<sup>2</sup>
7. The claimant has a limited education and is able to communicate in  
English.
8. Transferability of job skills is not an issue because the claimant does  
not have past relevant work.

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<sup>2</sup> The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.



1 rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th  
2 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,  
3 157 F.3d at 725.

4 The opinions of examining physicians are to be given more weight than non-examining  
5 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the  
6 uncontradicted opinions of examining physicians may not be rejected without clear and  
7 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
8 physician only by providing specific and legitimate reasons that are supported by the record.  
9 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

10 Opinions from non-examining medical sources are to be given less weight than treating  
11 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
12 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
13 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
14 Security Ruling ("SSR") 96-6p, 1996 WL 374180, at \*2. Although an ALJ generally gives  
15 more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a  
16 non-examining doctor's opinion may nonetheless constitute substantial evidence if it is  
17 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,  
18 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

19 2. *Charaine E. Herald, Ph.D.*

20 Dr. Charaine E. Herald, Ph.D., performed psychological examinations of the plaintiff  
21 on six separate occasions for the DSHS. AR at 209-30, 268-301. She diagnosed plaintiff with  
22 Attention Deficit Hyperactivity Disorder ("ADHD"), heroin dependence (in varying stages of  
23 remission), anxiety disorder NOS, and personality disorder with antisocial and paranoid traits.  
24 AR at 209-30, 268-301. In her most recent evaluation dated August 19, 2009, Dr. Herald

1 assessed plaintiff as having marked functional mental symptoms of attention deficit and social  
2 anxiety in the context of a normal workday. AR at 294. Specifically, Dr. Herald noted that  
3 although plaintiff has a daily hygiene routine<sup>3</sup> and is “able to perform serial calculations  
4 quickly with minimal errors,” plaintiff also showed marked impairments in comprehending  
5 complex instructions, learning new tasks, performing routine tasks, staying focused, relating to  
6 coworkers, eye contact, and behaving adequately in a workplace setting. AR at 296-97. For  
7 example, Dr. Herald stated that plaintiff “reports problems with distractibility and recent  
8 memory,” and that plaintiff is “reportedly able to perform manual tasks, but loses track of task  
9 or leaves in frustration after more than 2 hours.” AR at 296. Dr. Herald also found that  
10 plaintiff has a severe level of anxiety, and assigned him a Becks Assessment Inventory  
11 (“BAI”) score of 32. AR at 298, 301.

12 The ALJ discussed Dr. Herald’s opinions during the administrative hearing, as well as  
13 in his written decision, and ultimately afforded them “limited weight.” AR at 16, 40-41.  
14 Specifically, the ALJ listed the following reasons for assigning limited weight to Dr. Herald’s  
15 assessments: (1) plaintiff’s daily activities were inconsistent with Dr. Herald’s opinion that  
16 plaintiff has marked functional limitations; (2) Dr. Herald’s opinions are almost exclusively  
17 based on plaintiff’s self-reports; (3) Dr. Herald does not “conclusively link” plaintiff’s  
18 substance abuse to his mental health issues; and (4) Dr. Herald’s opinions are inconsistent with  
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21 <sup>3</sup> On numerous occasions, Dr. Herald assessed plaintiff as having no limitations  
22 regarding his personal hygiene and appearance. AR at 211, 217, 224, 296. However, in 2008,  
23 Dr. Herald observed that plaintiff had “dirty fingernails,” and plaintiff was thus evaluated as  
24 having a mild limitation in his ability to care for himself. AR at 283, 287. Late in 2008 and in  
2009, however, plaintiff was again evaluated as having average or normal hygiene. AR at 289,  
299. Though plaintiff may have occasional issues with cleanliness such as showering  
infrequently, his overall record reflects that plaintiff generally appears “adequately dressed and  
groomed.” AR at 257.



1 the opinions of other providers and with the objective medical evidence in the record. AR at  
2 16.

3 Plaintiff asserts that the ALJ erred by affording less weight to Dr. Herald's opinions  
4 than plaintiff's other providers on the grounds that he failed to state specific and legitimate  
5 reasons supported by substantial evidence. Dkt. 11. Because plaintiff's ability to perform  
6 daily tasks allegedly did not "correspond to a work-like setting," plaintiff disputes the ALJ's  
7 reasons for rejecting Dr. Herald's assessment on this basis. *Id.* at 4. In addition, plaintiff  
8 contends that Dr. Herald's methods included standardized testing, and therefore she did not  
9 solely rely on plaintiff's self-reports. *Id.* Finally, plaintiff disputes the ALJ's conclusion that  
10 his past incarcerations and drug abuse history "were the primary blocks from his ability to  
11 work and also drove his mental health issues." *Id.* at 4-5.

12 The Commissioner argues that the ALJ did not err, because plaintiff's daily activities  
13 show that his abilities are greater than Dr. Herald's assessed limitations. Dkt. 12 at 5. In  
14 addition, the Commissioner asserts that Dr. Herald's assessments were afforded less weight  
15 because she almost exclusively relied "on the claimant's subjective self-reporting." *Id.* at 5-6.  
16 He also states that plaintiff's substance abuse and incarceration were not the only blocks from  
17 his ability to work, but two of many "significant life stressors" that plaintiff has encountered.  
18 *Id.* at 7.

19 The Court finds that the ALJ's reasons for affording Dr. Herald's opinions less weight  
20 than the other medical opinions in the record were specific and legitimate, and are supported  
21 by substantial evidence in the record. Plaintiff's daily activities demonstrate that he does not  
22 have the marked functional limitations described by Dr. Herald. Specifically, plaintiff's ability  
23 to drive, set and keep appointments, and apply a daily methadone regimen reflects his ability to  
24 perform routine tasks as well as learn new ones. AR at 16. As the ALJ noted during the

1 hearing, a “typical day” for the plaintiff includes getting up at 8 a.m., getting breakfast at  
2 McDonald’s, driving to the methadone clinic, traveling to his grandmother’s house to do odd  
3 jobs such as lawn mowing from 11 a.m. – 7 p.m., showering, and then ending the day by eating  
4 dinner and watching TV with his girlfriend and her two children. AR at 40-42, 295.

5 Based on these substantial daily activities, the ALJ asked plaintiff during the hearing  
6 what would prevent him from working as a caregiver or janitor. AR at 42-43. Plaintiff  
7 initially responded, “My record.” AR at 42. When asked, by the ALJ, whether anything  
8 besides his criminal record would prevent plaintiff from obtaining such employment, plaintiff  
9 stated, “My memory.” AR at 42-43. However, Dr. Herald’s notes demonstrate that in addition  
10 to having a substantial daily routine, plaintiff could recall the Governor of the State of  
11 Washington, the President of the United States, and “perform digit spans forwards and  
12 backwards.” AR at 257. On July 24, 2008, Dr. Leslie Postovoit, Ph.D., concluded that  
13 “claimant [was] able to manage simple tasks without excessive interaction with the public.”  
14 AR at 261. Dr. Herald herself assessed plaintiff as “able to perform serial calculations quickly  
15 and with minimal errors” on August 19, 2009. AR at 296. The ALJ could reasonably  
16 conclude that Dr. Herald’s opinions regarding plaintiff’s marked limitations were “inconsistent  
17 with . . . claimant’s level of activities.” *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.  
18 2001). Thus, the ALJ did not err in affording less weight to Dr. Herald’s opinions based on  
19 plaintiff’s daily activities.

20 In addition, the Court agrees with the ALJ’s observation that Dr. Herald’s evaluations  
21 were largely based on the plaintiff’s own reports. AR at 209-30, 268-301. In evaluating the  
22 plaintiff’s functional limitations, Dr. Herald often lists plaintiff’s comments without analysis  
23 by directly quoting the patient or writing that the patient “states” or “reports” in the space  
24 provided for her own observations. AR at 217, 296. For example, Dr. Herald stated that

1 plaintiff “reports problems with distractibility and recent memory.” AR at 296. Plaintiff also  
2 stated “that he is unable to do anything for longer than 2 or 3 hours without becoming irritable  
3 and angry, and having to leave.” *Id.* Similarly, Dr. Herald noted that plaintiff “reports poor  
4 follow through on tasks . . . [He also] states that forcing him to do anything would set him up  
5 for failure, as he would then certainly not do what was being asked.” AR at 217. In  
6 comparison, Dr. Herald’s own observations of plaintiff’s behavior or limitations are scant.

7 Contrary to plaintiff’s argument that Dr. Herald actually relied on objective test results,  
8 these results were also based on plaintiff’s self-reporting. The BAI is an assessment in which  
9 the plaintiff himself checks boxes to indicate how and what he is feeling at the time. AR at  
10 214, 301. Similarly, Dr. Herald’s conclusions on the Mental Status Examination (“MSE”),  
11 were not apparently based on the objective tests performed. AR at 300. Specifically, the tests  
12 that Dr. Herald performed indicated that plaintiff was either not impaired or only mildly  
13 impaired. Her given reasons for assigning a GAF score of only 40 do not relate to her objective  
14 observations, but to what plaintiff reported.<sup>4</sup> AR at 299-300. For example, Dr. Herald cites  
15 plaintiff’s reportedly “poor follow through on chores” as a justification for the GAF score she  
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18 <sup>4</sup> The GAF score is a subjective determination based on a scale of 1 to 100 of “the  
19 clinician’s judgment of the individual’s overall level of functioning.” AMERICAN PSYCHIATRIC  
20 ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th ed. 2000).  
21 A GAF score falls within a particular 10-point range if either the symptom severity or the level  
22 of functioning falls within the range. *Id.* at 32. For example, a GAF score of 51-60 indicates  
23 “moderate symptoms,” such as a flat affect or occasional panic attacks, or “moderate difficulty  
24 in social or occupational functioning.” *Id.* at 34. A GAF score of 41-50 indicates “[s]erious  
symptoms,” such as suicidal ideation or severe obsessional rituals, or “any serious impairment  
in social, occupational, or school functioning,” such as the lack of friends and/or the inability  
to keep a job. *Id.* A GAF score of 31-40 indicates “some impairment in reality testing and  
communication” or “major impairment in several areas, such as work or school, family  
relations, judgment, thinking or mood.” A GAF score of 21-30 indicates “behavior is  
considerably influenced by delusions or hallucinations” or “serious impairment in  
communications or judgment” or “inability to function in all areas.” *Id.*

1 assigns. AR at 217, 300. Thus, the ALJ's assertion that "Dr. Herald's findings were almost  
2 exclusively based on the claimant's subjective self-reporting" is accurate. AR at 16.

3 Similarly, the ALJ did not err by stating that Dr. Herald failed to "conclusively link"  
4 plaintiff's substance abuse, such as plaintiff's past heroin use, with his diagnosed mental  
5 disorders. Specifically, Dr. Herald marked "yes" to indicate plaintiff's current or recent  
6 alcohol or substance use. AR at 295. Although the evaluation mandates a description of the  
7 symptoms and effects of plaintiff's substance use, Dr. Herald gave none. AR at 295. The ALJ  
8 further observed that "the evidence indicates . . . claimant's substance abuse and subsequent  
9 incarcerations, now in the past, were the primary blocks from his ability to work and also drove  
10 his mental health issues." AR at 16. Plaintiff has failed to identify any evidence to contradict  
11 this finding. Moreover, the ALJ properly acknowledged that plaintiff's mental health issues  
12 appear to have been caused by numerous life stressors. Specifically, the ALJ states that in  
13 addition to plaintiff's past incarcerations and drug abuse history, his "very limited education,  
14 lack of a formal work history, and lack of social supports" are all "significant life stressors"  
15 that have also affected his mental health. AR at 16.

16 Finally, the ALJ did not err in finding that Dr. Herald's evaluations "were not  
17 concurrent with the objective medical evidence, nor with those of [...] his providers." AR at  
18 16. Specifically, Dr. Herald reported that plaintiff is "markedly impaired" from performing  
19 simple cognitive and social tasks. AR at 211, 296. However, plaintiff displayed only  
20 moderate functional limitations according to the DDS psychiatric review and mental residual  
21 functional capacity assessment completed by Dr. Michael Brown, Ph.D., on October 8, 2007.  
22 AR at 242, 246. As previously stated, Dr. Postovoit affirmed Dr. Brown's assessment by  
23 determining that plaintiff was "able to manage simple tasks without excessive interaction with  
24 the public." AR at 261. On July 9, 2008, Dr. Shannon Jones, Ph.D., assigned plaintiff a GAF


1 score of 60. AR at 15. By contrast, Dr. Herald found plaintiff markedly impaired on  
2 numerous occasions and gave plaintiff a GAF score of 40. AR at 296, 300. With this evidence  
3 as a whole, the ALJ could reasonably find that Dr. Herald's opinions were not concurrent with  
4 the other medical opinion evidence in the record. AR at 16.

5 The role of this Court is limited. As noted above, it is the duty of the ALJ to resolve  
6 conflicts in medical testimony and other ambiguities that might exist. *Andrews*, 53 F.3d at  
7 1039. Accordingly, the Court finds that the reasons given by the ALJ to discount Dr. Herald's  
8 opinions were specific and legitimate and supported by substantial evidence in the record. The  
9 ALJ did not err in his assessment of Dr. Herald's opinions.

#### 10 CONCLUSION

11 For the foregoing reasons, the Court recommends that this case be AFFIRMED. A  
12 proposed order accompanies this Report and Recommendation.

13 DATED this 30th day of January, 2012.

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15 JAMES P. DONOHUE  
16 United States Magistrate Judge  
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